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No. 04-169

In The Supreme Court of the United States

GRAHAM COUNTY SOIL &
WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA
ex rel. KAREN T. WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Does the limitations period set forth in section 3731(b)(1) of the False Claims Act, which expressly applies to all civil actions "under section 3730," encompass a whistleblower's retaliation claim brought pursuant to section 3730(h), or do compelling reasons exist not to apply the plain language?

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STATEMENT OF THE CASE

On January 25, 2001, Karen Wilson filed in the district court a *qui tam* whistleblower action pursuant to the False Claims Act (31 U.S.C. § 3729 *et seq.*) ("FCA") alleging that the defendants submitted false claims for benefits under various federally funded agricultural programs in violation of the FCA. In her complaint, she also asserted an employment retaliation claim under section 3730(h) of the FCA, alleging that she was harassed for over a year by her employer and co-workers in retaliation for her whistleblower activities that culminated in her constructive discharge on March 7, 1997. (J.A. 25-30) Those acts of harassment included repeated criticism of her work without cause, obscene and hostile gestures, leaving a gun on her desk, threats to attack her violently and to kill her husband, threats to eliminate her position if she did not stop the federal investigation, and ostracism. (J.A. 25-30)

On May 30, 2002, the district court granted the defendant employer's Rule 12(b)(6) motion to dismiss the retaliation claim as time-barred. Rather than applying the six-year limitations period set forth in section 3731(b)(1) of the FCA, the district court applied the limitations period for the most closely analogous state-law cause of action, which it decided was the three-year period for North Carolina's wrongful discharge cause of action. Because the alleged date of Wilson's constructive discharge was over three years prior to her filing of the complaint, the district court concluded that the claim was time-barred and dismissed it. The district court granted Wilson the right to file an interlocutory appeal from its statute of limitations ruling, which she did.

Finding that the plain language of section 3731(b)(1) of the FCA controlled, the United States Court of Appeals for the Fourth Circuit reversed the district court and held that the six-year limitations period contained in that section applied to the Wilson's retaliation action. The defendant employer filed a petition for certiorari seeking a review of the Fourth Circuit's decision, which this Court granted.

SUMMARY OF THE ARGUMENT

The text of section 3731(b) of the FCA sets forth a six-year limitations period for "[a] civil action under section 3730" of the Act. Whistleblower retaliation actions, like Respondent's, are brought under paragraph (h) of section 3730. Thus, applying the plain meaning of the statute, the Courts of Appeals for the Fourth and Seventh Circuits properly have held that the six-year limitations period applies to whistleblower retaliation claims.

Petitioners make a weak attempt at arguing that "a civil action under section 3730" somehow does not include the retaliation action set forth in section 3730(h), and thereby does not provide an express limitations period. This effort to convince the Court that black actually is white is unavailing. Petitioners contend that the straightforward language is ambiguous by citing purported ambiguities in other parts of the FCA employing similar language. Their ambiguity argument fails because it does not demonstrate how those other possible ambiguities render the operative language in section 3731 ambiguous on the point at issue.

Because the language is plain, Petitioners in effect are contending that the Court should disregard the plain

language because it results in a limitations scheme that is unusual and that, in their view, leads to undesirable results. Petitioners apparently fail to characterize properly their main argument as one of disregarding the statute's plain language because the onerous hurdle that the argument would face. Courts are to deviate from the plain language only in the rare circumstances where it would lead to a truly absurd result, or where there is a clearly expressed legislative intent to the contrary. Neither is present here.

Petitioners' main absurdity argument is that it would make no sense for the six-year limitations period in section 3731(b)(1) to apply to a retaliation claim since, Petitioners argue, there is no connection between the retaliation claim and a "violation of section 3729," which is the trigger for the commencement of the limitations period set forth in (b)(1). This is simply false. As Judge Duncan pointed out in her masterful Fourth Circuit opinion below, there is a crucial nexus between the two C a retaliation claim under section 3730 requires an alleged violation of section 3729. Furthermore, the approach Congress adopted achieved a "simplicity of administration" by identifying a single, readily identifiable point at which to begin the limitations periods for all actions under section 3730.

Petitioners' second absurdity argument can be easily dismissed. Petitioners suggest that because a tolling provision in section 3731(b)(2) does not apply to retaliation claims, then it is absurd to apply the six-year limitations period in section 3731(b)(1). However, Petitioners give no reason as to why the application of section 3731(b)(1) is dependent on the applicability of section 3731(b)(2). It is not, and courts are unanimous in implicitly rejecting this argument by applying (b)(1) to certain *qui tam* actions

even though some of those courts have held that (b)(2) is not applicable to them.

In an attempt to buttress their absurdity arguments, Petitioners offer a couple of contrived hypotheticals and then claim that the results would be absurd under the plain language of section 3731. Petitioners apparently could not find a single case in which either of the two scenarios has ever arisen since the FCA was amended in 1986, almost nineteen years ago, and neither rises to the level of absurdity required to avoid the statute's plain language.

Petitioners also seek to have the Court disregard the plain language of section 3731 by claiming that it is inconsistent with the legislative history. However, none of the history that Petitioners cite directly addresses the issue. Rather, Petitioners offer selective snippets of Congressional history from which inferences could be drawn opposite of what Petitioners seek to have the Court draw. Further, Petitioners fail to explain away the legislative history cited by the Fourth Circuit below that supports the conclusion that Congress intended what the plain language says. In short, Petitioners' proffered legislative history falls far short of the "clearly expressed" legislative intent necessary to justify a disregard of the plain language of the statute.

Even if the statutory language were ambiguous, and it is not, this Court has previously recognized that there is a presumption of resolving an ambiguity in favor of including the federal claim within the scope of the federal limitations period as opposed to concluding that the claim has been given no federal limitations period. This presumption has been reinforced by the passage in 1990 of a federal "catch-all" limitations period of four years.

Furthermore, this Court has directed that the limitations period of the most closely analogous state cause of action is not to be used where, as is true here, it would interfere significantly with the purpose of the federal statute. Also, when it is a practical necessity to bring two federal claims together, and if one of them has an express federal statutory limitations period while the other does not, that federal statutory period, rather than a state law limitations period, should also be applied to the other claim. Here, the practical necessities that often require that the retaliation claim be brought with the underlying *qui tam* claim weigh in favor of applying the six-year statutory limitations period to the retaliation claim.

Finally, the use of the limitations period of the "most closely analogous" state law would impose the onerous burden on the whistleblower of making an often difficult analysis of which statute would apply, which would be compounded by a complex choice of law analysis. Such additional burdens on the whistleblower undercut one of the key purposes of the 1986 Amendments to the FCA – to increase the incentives to the whistleblower to file a *qui tam* claim – by serving to discourage her from doing so.

Accordingly, the Court should affirm the Fourth Circuit's reversal of the district court's decision to grant a 12(b)(6) motion to dismiss whistleblower Wilson's retaliation claim on statute of limitations grounds, and hold that the six-year limitations period set forth in section 3731(b)(1) of the FCA does apply to retaliation claims brought under section 3730(h).

ARGUMENT

I. The Six-Year Limitations Period Set Forth In Section 3731(b)(1) Of The FCA By Its Plain Terms Applies To Whistleblowers' Retaliation Actions.

A. Under The Plain Meaning Of Section 3731 Of The Act, The Scope Of Its Limitations Period Includes Retaliation Claims.

Section 3731(b) of the FCA provides, in pertinent part, that

> [a] civil action under section 3730 may not be brought – –
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed. . . .

31 U.S.C. § 3731(b). Retaliation actions are brought pursuant to paragraph (h) of section 3730. Thus, a retaliation action is a "civil action under section 3730." Accordingly, applying the language of section 3731(b)(1) as it is written, the scope of the six-year limitations period contained therein includes retaliation claims. Section 3729 establishes the liability for presenting a false claim to the Government. "Hence, the effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be brought no more than six years after the date on which the underlying violation was committed." *United States ex rel. Wilson v. Graham Cty. Soil & Water Conserv. Distr.*, 367 F.3d 245, 248 (4th Cir. 2004).

Where, as is true here, "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters*, 489

U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Both the Fourth Circuit below and the Seventh Circuit have properly concluded that, applying its plain language, section 3731 requires that the six-year limitations period be applied to retaliation actions. *See Wilson*, 367 F.3d at 251 (4th Cir. 2004); *Neal v. Honeywell*, 33 F.3d 860, 865 (7th Cir. 1994).[1] As Judge Easterbrook reasoned:

> Is the suit under § 3730(h) timely? Section 3731(b)(1) allows six years to file suit under § 3730 from "the date on which the violation of § 3729 is committed". Section 3729 deals with making false claims. Neal filed this suit under § 3730 within six years of Honeywell's false claims. It is therefore timely.

33 F.3d at 865.

B. Contrary To Petitioners' Attempts, Ambiguity Is Not An Issue Here.

Making an argument that neither the Ninth Circuit decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), nor the dissenter to the Fourth Circuit decision below made, Petitioners claim that "a civil action under section 3730" in section 3731(b) is not plain, but rather is ambiguous with respect to whether or not the phrase includes all three actions authorized by section 3730: 1) § 3730(a) – action brought by Attorney

[1] The only other appellate decision to address the issue did not dispute that, under a plain reading of section 3731, retaliation claims are subject to the six-year limitations period; rather, it based its ruling on the suggestion that the application of the plain meaning would lead to absurd results contrary to the legislative history. *See Lujan*.

General; 2) § 3730(b) – *qui tam* action; and 3) § 3730(h) – retaliation action. (Pet. Br. 14) However, it is clear that the substance of Petitioners' arguments do not raise the issue of ambiguity. Ambiguity is present only when there is a question as to the meaning of what Congress said. Here, there is no dispute that a retaliation claim is a "civil action under section 3730." Thus, there is no question as to the meaning of what Congress said in section 3731(b) – a retaliation claim is included in the scope of the limitations period set forth therein. As discussed further in Part II below, what Petitioners are really contending is that Congress did not mean to say what it did.

In support of their ambiguity argument, Petitioners attempt to raise issues as to whether Congress really meant what it said when it used phrases similar to "a civil action under section 3730" elsewhere in the FCA. However, this merely begs the question as to how these purported issues with respect to similar phrases elsewhere in the FCA render the phrase "a civil action under section 3730" ambiguous *as it is used in section 3731(b).* It doesn't. *Cf., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("The plain meaning of [subsection in issue] cannot be altered by the use of a somewhat different term in another part of the statute"). That phrase as used in section 3731(b) is clear and unambiguous. *Wilson,* 367 F.3d at 250-51.

Furthermore, if Congress had meant to limit the scope of section 3731 to only actions brought by the Attorney General under section 3730(a) and *qui tam* actions under section 3730(b), it easily could have drafted the language to accomplish this. As the Fourth Circuit pointed out below, "[s]*ection 3731(b) could* have provided that a 'civil action under *section 3730(a) or (b)* may not be brought more than

six years from the date the violation of *§ 3729* is committed.' This Congress did not do." *Id.* However, elsewhere in the FCA, Congress demonstrated that it knows how to limit the applicability of a section to particular subsections in that manner if it so intends. For instance, section 3731(d) reads "any action under subsection (a) or (b) of section 3730." This is precisely what Congress would have written in section 3731(b) if it intended to exclude retaliation claims from the section's ambit – but it did not.

In any case, the court's function in interpreting a statute is "to determine whether the *language at issue* has a plain and unambiguous meaning with regard to *the particular issue in the case.*" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (emphasis added). Petitioners' citations to other language in the FCA dealing with other issues does not assist in this determination. As demonstrated above, the language in section 3731(b) is plain and unambiguous on the issue in question and ambiguity is simply not an issue here.

II. None Of The Rare Exceptions To The Court's Duty To Enforce The Plain Meaning Of Section 3731 Of The FCA Apply Here.

While Petitioners make a half-hearted (and failing) attempt to argue that section 3731 of the FCA is ambiguous, their real argument is that the Court should disregard the plain meaning of section 3731 because, in their view, it does not make sense and leads to undesirable results, and Congress did not really mean what it said. It is not surprising that Petitioners fail to characterize properly their main arguments, since, properly characterized, the arguments face a formidable hurdle. A necessary consequence of the Constitutional principle of the separation of powers is that

a court is forbidden from substituting its own "pleasure to that of the legislative body," *The Federalist* No. 78, 469 (C. Rossiter ed. 1961) (A. Hamilton). Accordingly, courts are bound by the plain language of a statute. They are to deviate from that plain language only in the rare circumstances where there is "a clearly expressed legislative intent to the contrary," *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993), or its literal application would lead to an absurd result, *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940). Neither of those rare exceptions comes close to applying here.

A. A Straightforward Application Of The Limitations Period In Section 3731 To Retaliation Actions Does Not, As Petitioners Claim, Lead To An Absurd Result.

A "narrow exception," *Public Citizen v. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring), to the enforcement of the plain language of a statute exists when its application would result in "patently absurd consequences," *United States v. Brown*, 333 U.S. 18, 27 (1948), that "Congress could not possibly have intended," *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Conner, J., dissenting). In its exercise of the narrow exception, the Court must act "with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring). Petitioners' absurdity arguments fall far short of that standard.

1. Petitioners' Suggestion That The Plain Language Of 3731 Results In An Absurdity Because There Purportedly Is No Link Between A Violation Of Section 3729 And A Retaliation Action Is Simply Wrong.

Petitioners' main "absurd results" argument is the suggestion that it would be absurd to apply the plain language of section 3731 to a retaliation claim since, Petitioners argue, there purportedly is no logical connection between a retaliation claim and a "violation of section 3729," which triggers the six-year limitation period under section 3731(b)(1). This is demonstrably false. There is a crucial nexus between a retaliation claim and a violation of section 3729: a retaliation claim, like any claim under section 3730, requires an alleged violation of section 3729. As Judge Duncan explained in the Fourth Circuit's majority opinion:

> § 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly. By its terms, § 3730(h) protects any "lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section*." *Id.* (emphasis added). Because an action under § 3730 will not lie absent an alleged violation of § 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under § 3730. *See Neal*, 33 F.3d at 865. (noting the "simplicity of administration" afforded by the approach codified in § 3731(b)(1)).
>
> * * *
>
> If an employee's termination is "independent" of a violation of § 3729 and the employee's decision

> to report it, at the very least it would not be retaliatory. Alternatively, if the termination could fairly be described as "retaliatory," but could not be tied to the reporting of a violation of § 3729, it would be actionable not under the FCA and § 3730(h) but under Title VII or some other statute prohibiting employment discrimination. The events that trigger the statute of limitations may precede the final event that gives rise to an action for retaliation [reference omitted], but that fact does not render the events "independent" of one another.

Wilson, 367 F.3d at 251 & n.7.

Accordingly, the premise upon which this "absurd results" argument relies, that there is no relationship between a retaliation claim and the underlying false claims violation, or as Judge Wilkinson put it in his dissenting opinion below, that the two are "independent," *see Wilson*, 367 F.3d at 258, is simply false.

The essence of the Petitioners' criticism of section 3731(b) is that it "is a departure from the limitations periods generally applicable to claims of retaliation," *Wilson*, 367 F.3d at 252, n.10, and is one that Petitioners (and their federal contractor business association amici) do not prefer and would not have selected.

> Nevertheless, when Congress's intent to endorse the benefits and consequences of one statutory scheme over another is clear from the text of the statute, as we conclude it is here, "the wisdom of Congress' action . . . is not within our province to second guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222, 154 L.Ed. 683, 123 S.Ct. 769 (2003).

367 F.3d at 252, n.10. Therefore, this Court should reject Petitioners' invitation to second guess Congress' scheme for dealing with the unique concerns and procedural issues generated by the FCA, and apply section 3731 as it is written.

2. Contrary To Petitioners' Argument, The Applicability Of Section 3731(b)(1) To Retaliation Claims Is Unaffected By Whether The Tolling Provision In Section 3731(b)(2) Also Applies.

In their second "absurdity" argument, Petitioners suggest that, because the tolling provision in section 3731(b)(2) appears not to apply to retaliation claims since (b)(2) refers to an "official of the United States charged with responsibility to act" and there is none in a retaliation claim, the application of the six-year limitations period in (b)(1) to retaliation claims is thereby rendered an absurdity. This argument suffers from the basic logical error of concluding that just because one subpart of a provision does not apply, then none of the subparts can apply.[2] Petitioners fail to state a reason why (b)(1) could not apply to a retaliation claim, even if (b)(2) might not – the two subparts are not logically dependent upon each other. In fact, courts are unanimous that the six-year limitations period in (b)(1) applies to a *qui tam* action in which the government has not intervened, even though courts are divided on the issue of whether (b)(2) applies to such an action. *Compare United States ex rel. Thistlethwaite v. Dowty Woodsville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.

[2] Indeed, the two subsections are separated by the conjunction "or," so that both subsections cannot apply.

N.Y. 1998) (holding that the six-year limitation period in (b)(1) applies, while the tolling provision in (b)(2) does not) *with United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1214-16 (9th Cir. 1996) (both (b)(1) and (b)(2) apply). Thus, both logic and case law preclude Petitioners' argument.

3. Petitioners' Extreme Hypotheticals Do Not Constitute Absurdity That Would Justify Deviating From The Plain Language Of Section 3731.

Petitioners finally attempt to buttress their absurdity argument by setting forth a couple of contrived and unlikely hypotheticals involving the application of the limitations period in section 3731 to a retaliation claim, and then suggesting that the results are so unacceptably absurd that the Court should disregard the plain meaning of the statutory provision.

The Court in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460-61 (1892), set forth examples of true absurdity: (1) where a sheriff is prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder; (2) where a medieval law against drawing blood in the streets is applied against a physician who came to the aid of a man who had fallen down in a fit. *Public Citizen*, 491 U.S. at 470-71.

In light of this intentionally-high threshold, the Petitioners' attempt to fit this statute into the narrow exception falls well short. Indeed, Petitioners have set forth two extreme scenarios for which they contend an application of the plain language of section 3731(b) creates

an "illogical and unmanageable scheme." (Pet. Br. 22). The reality, however, is far less dramatic.

The first hypothetical is that in some extreme situations the limitations period could run before the employee is discharged or discriminated against. As Judge Easterbrook observed in *Neal*, 33 F.3d at 865, that possibility does not render the scheme absurd since some statutes, statutes of repose, are designed to do exactly that – bar certain claims before they even arise. And if the employer deliberately waited out the six-year period until it retaliated, the federal doctrines of equitable tolling or estoppel are potentially available. *Id.* Further, any retaliatory conduct likely will occur close in time to the actions protected by section 3730(h). *See id.* at 865-66. As the Fourth Circuit observed:

> As a result, there would be few instances in which several years would pass between the violation, the protected conduct, and the retaliatory act. Additionally, the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the [Petitioners] would occur. Moreover the six years provided from the date of the violation should be sufficient to encompass the protected act and the retaliation, lest they both face challenges for attenuation and staleness.

Wilson, 367 F.3d at 253.

The second hypothetical supposes a scenario wherein a retaliation claim is brought for which no underlying violation of section 3729 has actually occurred, i.e., an employee has incorrectly "blown the whistle." Petitioners contend that in this scenario the limitations period set forth in section 3731(b)(1) would never begin to run. (Pet.

Br. 23-24). However, this is based on a construction that is incompatible with the broader context of the FCA. *See Wilson*, 367 F.3d at 254-55. As Petitioners point out, in order to engage in activity protected by section 3730(h), an employee must have an objective good-faith basis that a false claim occurred. (Pet. Br. 23, n.2 (*citing Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469 (7th Cir. 2004)). Although this issue has apparently not yet been adjudicated (which demonstrates the improbability of it occurring), it is a reasonable position that in this circumstance the limitations period should run from the time that the alleged violation of section 3729 was believed by the employee to have occurred (even if it ultimately turned out not to be an actual violation) given that the retaliation claim is based on that same alleged violation. Thus, Petitioners' proffered absurdity is based on the unlikely assumption that this issue would be adjudicated differently in a situation that apparently has never arisen. Thus, this scenario also does not rise to the level of absurdity required to avoid the plain language of the statute.

The scenarios proffered by Petitioners are extreme cases. Although nearly twenty years have passed since the 1986 Amendments to the FCA, Petitioners cited no cases wherein the alleged absurd scenarios actually occurred in the real world. Certainly in this case, as in the other reported cases, application of the plain language does not lead to an absurd result. Further, such scenarios can be conjured up with respect to the plain language of many statutes, but this alone does not merit the disregard of that language. "[S]trange problems and questions may arise in the application of the plain meaning of many statutes under particular sets of facts. Still, the task of this Court is not to answer every conceivable question or

hypothetical about a statute." *Grand ex rel. United States v. Northrop Corp.*, 811 F.Supp. 333, 336 (S.D. Ohio 1986) (citations omitted). Rather, it is to analyze the statutory language at issue "with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Accordingly, the Petitioners fail to clear the high hurdle of demonstrating that applying the plain language of section 3731(b)(1) to retaliation actions would produce "patently absurd consequences."

B. Petitioners' Reliance On Legislative History To Disregard The Plain Language of Section 3731 Is Misplaced.

In order to disregard the plain reading of a statute based on the legislative history, there must be "a clearly expressed legislative intent to the contrary," *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Despite Petitioners' efforts to show otherwise, there is no "clearly expressed legislative intent" in the legislative history contrary to the plain meaning of section 3731(b) of the FCA.

All that Petitioners are able to offer are a few selective snippets from the legislative history that do not address directly the statute of limitations period for retaliation actions. Rather, the Petitioners seek to have the Court draw inferences from those snippets that are favorable to its position, when one can draw opposite inferences that are more reasonable.

Petitioners first cite the statement that Congress, in forming the whistleblower protections in the 1986 False Claims Act Amendments to the FCA, "was guided by the

whistleblower protection provisions found in Federal safety and environmental statutes including [eight such statutes]." (Pet. Br. 15). Noting that those eight statutes have very short express periods of limitations for the whistleblower claims, Petitioners contend that one should infer from this that Congress did not intend for the FCA retaliation claim to have a longer six-year limitations period. However, one could just as reasonably infer from that statement that Congress was guided by the other eight whistleblower statutes in setting forth an express and uniform limitations period for the FCA retaliation claim (the six-year limitation in section 3731), as it did for those eight other types of whistleblower claims, rather than failing to provide a limitations period for it.

Citing *Lujan*, 162 F.3d 1027 (9th Cir. 1998), Petitioners point to the amendment of section 3732(b) that replaced "violation" with a "violation of section 3729" and then ask the Court to guess from that change that Congress did not intend for the limitations period to include retaliation actions. However, Petitioners and the Ninth Circuit in *Lujan* have simply ignored, rather than successfully refuting, Judge Easterbrook's observation in *Neal*, 33 F.3d 860, 865 (7th Cir. 1994), that a better explanation (or at least a viable one) is that "Congress [] opted for simplicity of administration" in giving the *qui tam* and retaliation claims the same limitations period beginning with the section 3729 violation since it is often "easier to determine the date of a false claim than to pin down the time of the retaliatory acts." *Id.* In fact, this additional language left no doubt that Congress intended the false claim to trigger all limitations periods because the word "violation" alone may have been unclear as to the trigger for retaliation claims. Thus, Petitioners' speculation as to the intent

behind Congress' wording changes to the statute fall far short of the evidence of "clearly expressed legislative intent" necessary to disregard the plain meaning of a statute. *See Reves*, 507 U.S. at 177. Accordingly, the Court should reject petitioners' argument on this point.

Petitioners' other two cites to the legislative history – the brief comments in the Senate Report and in the Congressional Record by Congressman Fish – as to how the modification of the limitations period provisions would protect the Government, also fall far short of showing a clear Congressional intent with respect to the applicability of the period to the retaliation claim. Petitioner seeks to have the Court make inferences from their silence as to the retaliation claim. However, one may make the more reasonable assumption that the intent of those comments was merely to highlight how the new tolling period would protect the Government, rather than to present an exhaustive exposition as to functioning and applicability of the limitations period for each of the three actions set forth in section 3730. In any case, no *clear* legislative intent on this point can be gleaned from these statements.

In sum, Petitioners' arguments that the legislative history shows Congressional intent that the retaliation claim not be subject to the six-year limitations period rely on conjecture and unwarranted inferences. They are unpersuasive, and in any case, fall far short of showing a clearly expressed Congressional intent sufficient to justify the Court disregarding the plain language of section 3731(b).

III. In Any Event, Any Ambiguity In The Scope of The FCA's Statutory Limitations Period Should Be Resolved In Favor Of Applying It To The Retaliation Claim.

A. The Legislative History Reinforces The Conclusion That Section 3732(b)(1) Applies To Retaliation Actions.

As the Fourth Circuit demonstrated in great detail, "[e]ven if it were unclear whether Congress intended the language of § 3731(b)(1) to apply to actions under § 3730(h), the review of the legislative history required by that ambiguity reinforces the conclusion that the section applies to retaliation claims under the FCA." *Wilson,* 367 F.3d at 252. In discussing the provisions created by the 1986 amendments, the Senate bill proposed "a new section 3734" containing the retaliation action. *See* S. Rep. at 34, *reprinted in* 1986 U.S.C.C.A.N. at 5299. However, no such section was ultimately added to the FCA. Instead, the retaliation provision was placed in section 3730 as subparagraph (h). Had the retaliation provision been added to the FCA as a separate section, rather than as a subparagraph to 3730, then it would not have been a "civil action under 3730" and therefore would not have been subject to the limitations provision in section 3731. "Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply." *Wilson*, 367 F.3d at 252; *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

Petitioners go to great lengths in an attempt to convince the Court that it should draw from this legislative history a conclusion opposite of the one drawn by the Fourth Circuit. (Pet. Br. 18-21). In support of their argument, they cite brief comments in a Senate Report and in the Congressional Record made by Congressman Fish that highlight the addition of the tolling provision of section 3731(b)(2) to the FCA to protect the Government's interests. This contributes nothing to the analysis since the tolling provision is not at issue and no one is asserting that it applies to the retaliation claim. Given their focus on the addition of the tolling provision in (b)(2), the comments' silence as to the applicability of the six-year limitations period in (b)(1) to retaliation actions does not carry the weight that Petitioners contend it does, and fails to alter the persuasive force of the Fourth Circuit's analysis on this point.

B. Even If An Ambiguity Existed In Section 3731, It Should Be Resolved In Favor Of Including Within Its Scope The Retaliation Action.

Even if the scope of the limitations period set forth in the Act were arguably ambiguous on the issue of whether it included the retaliation claim, that ambiguity should be resolved in favor of inclusion as opposed to the retaliation claim having no federal statutory limitation period. *See Adams v. Wood*, 6 U.S. 336, 342 (1805) (cited by Justice Scalia on this point in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 170 n.5 (1987) (Scalia, J., concurring)).

The propriety of this rule appears to be reinforced by the enactment in 1990 of 28 U.S.C. § 1658. That statute provides for a four-year limitations period for civil actions created after its enactment in 1990 unless a more specific period is provided. Although the law is not retroactive and would not change the rule that federal actions created prior to 1990 that do not have a federal statutory limitations period should usually incorporate the various state law limitations periods, it does demonstrate Congress' dissatisfaction with the resort to the "hodge podge" of state limitation periods and gives new impetus to the rule in *Adams* that any ambiguity as to the applicability of federal statutory limitation period should be resolved in favor of applying the limitation period to the cause of action.

IV. In Any Case, The Various State Limitations Periods Should Not Be Used Where, As Is True Here, They Would Be At Odds With The Effective Operation Of The FCA And Effectively Diminish The Limitations Period For *Qui Tam* Claims.

A. Using The Various State Limitations Periods Would Effectively Diminish The Limitations Period For *Qui Tam* Claims.

Given that the statutory provision in question C section 3731(b)(1) of the FCA, clearly and unambiguously applies to retaliation claims, the inquiry need not go further. However, even if that provision did not expressly apply to retaliation claims, the limitations period for the most closely analogous state cause of action should not be applied if it is at odds with the purpose or operation of the federal law, *see North Star Steel Co. v. Thomas*, 515 U.S.

29, 34 (1995), as its application would be here. Even the Supreme Court case relied upon by the Ninth Circuit in *Lujan* makes this clear. *See Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989) (state limitations periods should not be used if "they frustrate or significantly interfere with federal policies").

Congress intended for the False Claims Act to unleash a "'posse of ad hoc deputies [like whistleblower Wilson] to uncover and prosecute frauds against the government.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citation omitted). "Because Congress was concerned about pervasive fraud in 'all Government programs,'" by its 1986 amendments to the FCA, Congress "enhanced the incentives for relators [whistleblowers] to bring suit," *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003), including making retaliation against the whistleblower an actionable claim. However, since in most cases the false claims and retaliation "will occur close in time," *Neal*, 33 F.3d at 865, whistleblowers would be stripped of recourse for their retaliation injuries long before the six-year statute ran on the corresponding *qui tam* claim if the state limitations periods (e.g., Tennessee, New York and California (1 year)), were applied to the retaliation claim.

In the absence of a remedy for the harms they suffered from the retaliation, many potential whistleblowers will be deterred from bringing *qui tam* cases, thereby frustrating the Congressional policy of encouraging those suits and the resulting recoveries to the federal treasury. Using the state law limitations period for retaliation claims would thus have the practical effect of shortening the six-year limitations period for those *qui tam* claims, a result that is at odds with the important Congressional

policy that *qui tam* actions have a six-year limitations period, and is therefore unacceptable. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958) (using the shorter state law limitations period for one federal cause of action where the practicalities require that it be brought with another federal action with a longer federal statutory limitations period "effectively diminishes the time within which the [plaintiff] must commence his [other cause of action]," which is unacceptable); *North Star Steel*, 515 U.S. at 29; *Reed*, 488 U.S. at 327.

This conclusion is reinforced by the fact that since *qui tam* and retaliation claims are interrelated, and it is usually a practical necessity to bring the two claims together, the two claims should have the same statutory limitations period even if the retaliation claim would not otherwise have an applicable federal statutory limitations period. *See McAllister*, 357 U.S. at 225-26 (1958) (where "practical necessity" usually requires that two federal claims be brought together, but one claim has an express federal limitations period while the other does not, that practical necessity mandates that the other claim have the same limitations period rather than one based on state law).

B. Determining The Appropriate State Law Presents Unwanted Difficulties.

A clear objective of Congress in amending the FCA in 1986 was to "enhance[ ] the incentives for relators to bring suit." *Cook County*, 538 U.S. 119, 133 (2003). Congress's decision to use the same six-year limitations period scheme for all claims brought under FCA, which the Seventh Circuit in *Neal* suggested was motivated by desire

for "simplicity of administration," also has the effect of simplifying the crucial legal task of the relator in determining the limitations period for his *qui tam* and retaliation claims, thus enhancing his incentives to bring suit.

1. Determining The "Most Analogous" Statute To Her Retaliation Claim Would Present Unnecessary Difficulties For The Employee And The Court.

Petitioners simply ignore the compelling reasoning set forth in the majority opinion of the Fourth Circuit as to why Congress opted for the simplicity of administration of its scheme rather than a "hodge podge" of state limitations periods. The difficulties in determining which statute of a state is most analogous "would further undermine the protection afforded by § 3730(h)." *Wilson*, 367 F.3d at 256. Indeed, in this case the decision by the district court to apply North Carolina's statute relating to wrongful discharge might be obvious as to the wrongful discharge claim, but is dubious with respect to Relator Wilson's claims of retaliation and intimidation.[3] *See Owens v. Okure*, 488 U.S. 235, 241 (1989) (noting difficulty in ascertaining most analogous statute in states with multiple statutes of limitation for personal injury actions). Further, the collateral litigation required to resolve the issue "would exacerbate any uncertainty as to the time

[3] Petitioners' assertion that "the act of discharge or retaliation is open and obvious to all," (Pet. Br. 11), is simply not true. While a discharge normally is obvious, other acts of retaliation, which are covered by section 3730(h), are often concealed or disguised by the retaliator and difficult to uncover and trace – similar to fraud. *See, Neal*, 33 F.3d at 865 (often "easier to determine the date of a false claim than to pin down the time of the retaliatory acts").

available for filing a retaliation claim, and thereby reduce the employee's incentive to report a violation of § 3729." *Wilson*, 367 F.3d at 256.

2. Complex Choice Of Law Issues Would Arise.

Moreover, under Petitioners' proposed rule, choice of law issues could be more puzzling than a Rubik's Cube for an employee deciding whether to blow the whistle on fraud (and for a court adjudicating the issue).

> Reference to state statutes of limitations may require district courts to address choice of law issues in determining which state's law it must look to before selecting the appropriate state statute. Cf. [*United States ex rel.*] *Ackley* [*v. IBM*], 110 F.Supp.2d at 402-03 & n.7 (disagreeing with defendant's argument that Maryland's *lex loci delicti* choice-of-law rule applied and required recourse to New York's one-year limitations period, and collecting cases for and against proposition that the most analogous statute is to be identified from the forum state's code, rather than following an application of the forum state's choice-of-law rules).

Wilson, 367 F.3d at 256. As evidenced by the discussion of the district court in *Ackley*, these difficulties are far from hypothetical, but have arisen, and will arise with increasing frequency, under Petitioners' proposal. If state law limitations periods were to be used, relator's counsel could be forced into considering a forum-shopping analysis, with the possibility that the retaliation and *qui tam* claims are ultimately brought in places with little relation to where the false claims occurred, or not brought at all where

relator or her counsel conclude that the risks and complexities of being wrong on this issue outweigh other considerations.

CONCLUSION

Based on the foregoing, whistleblower Wilson respectfully requests that the Court affirm the decision of the Court of Appeals reversing the order of the district court dismissing Wilson's retaliation claim on statute of limitations grounds with the instruction that the district court apply the six-year limitations period set forth in section 3731(b)(1) of the FCA.

Respectfully submitted,

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